



# Understanding Federal Public Lands Laws

## The National Environmental Policy Act (NEPA) and Endangered Species Act (ESA)

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# The National Environmental Policy Act (NEPA)

All agencies of the Federal Government shall... include in every recommendation or report on proposals for... major federal actions significantly affecting the quality of the human environment, a detailed statement ... on the environmental impact of the proposed action." 42 U.S.C. § 4332 (2)(C)(i).



# The Purpose of NEPA

NEPA is simply a planning tool where federal agencies consider the impacts of their proposed actions to determine whether a different action would result in a better final decision.

**Important Point:** It only mandates a particular decision-making process, not particular results.



# Enforcing NEPA: What Happens if Federal Agencies Do Not Follow NEPA's Decision-Making Process?

The Agency *may* have to stop implementation and *will* have to go back and fix what the agency did wrong. The new final decision *could* be the same, but ideally it would be different.

**Important Point:** To challenge the agency's final action, you must participate in the process and offer your input.



...We will come back to this issue later.

## The Environmental Impact Statement (EIS)

- The EIS is the document the lead agency develops to consider the impacts of and alternatives to the proposed action which might result in a different final action. 40 C.F.R. §1502.14-.16.
- Main Contents of an EIS
  - Statement of Purpose and Need
  - Alternatives
  - Environmental Effects (Direct, Indirect, Cumulative)
  - Mitigation Measures
  - Public Involvement and Responses
- The final decision must be reasoned based on the analysis in the EIS



# When is an EIS Required?

An EIS is required when:

- ✓ A federal agency (e.g. BLM, FWS, USFS)
- ✓ Proposes a major action (e.g. plan, project, permit, license)
- ✓ That will significantly affect the quality of the human environment
- ✓ No categorical exclusions apply (23 C.F.R. §771.119; 40 C.F.R. § 1508.4)

If it is unclear, the agency may prepare an Environmental Assessment (EA) to decide whether an EIS is required. Otherwise, the agency files a Finding of No Significant Impact (FONSI) and moves forward with the proposed action.

**Note:** There are several lawsuits over agencies decisions not to develop an EIS. Often a different outcome is desired, or nothing at all. Courts typically favor the development of an EIS. This is typically an issue with smaller projects.



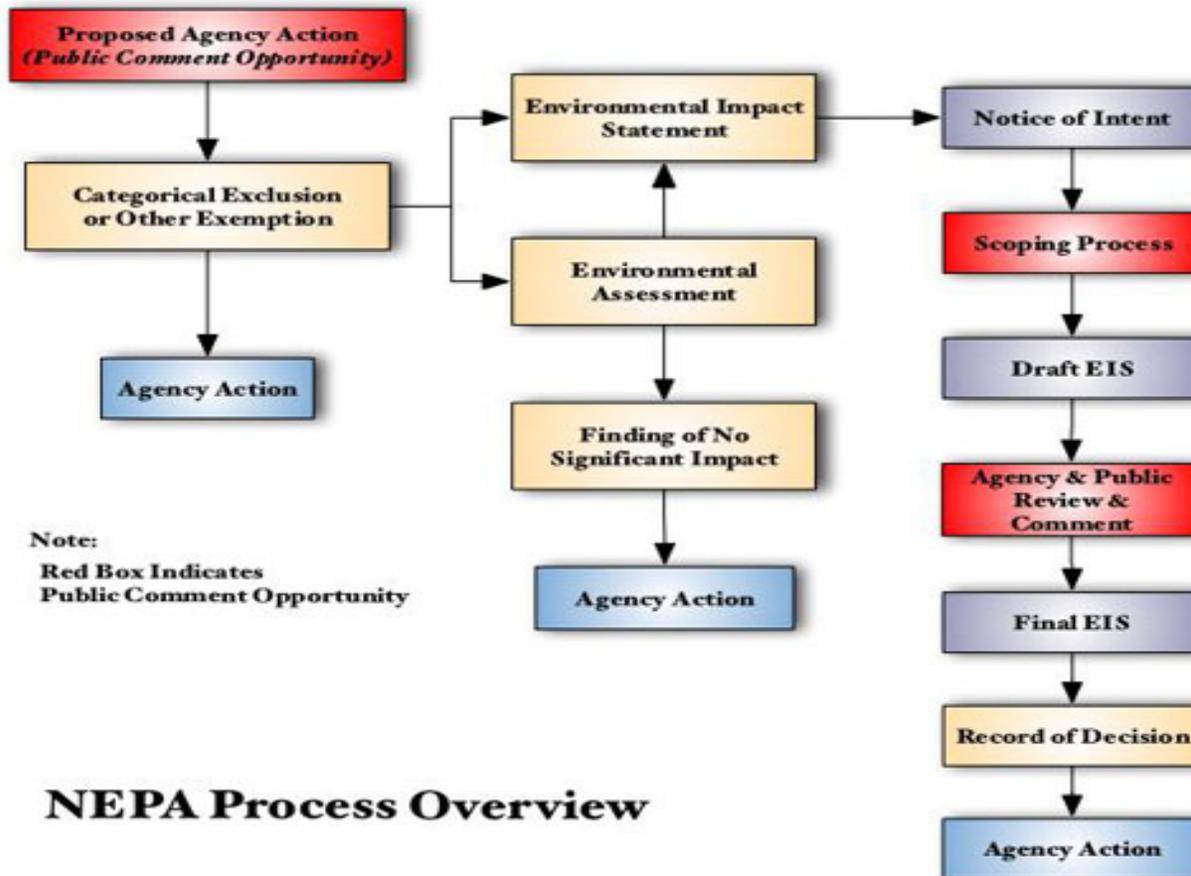
# Special Local Government Participation (Cooperating Agency Status)

- Official mechanism for counties to participate
- Opportunity to shape the outcome of the project using local expertise and information
  - Selecting the appropriate individuals to be involved in the assessment will ensure that more adequate (and accurate) consideration is given to potential impacts associated with the development.
- Standing for legal recourse

**Important Point:** Invest the time, if you can, to be a cooperating agency. If you cannot, then write a letter to the agency explaining why and submit comments, even if they are only a page. This is your only opportunity to think about desired outcomes and engage participants who can work with the agencies if you cannot.



# The EIS Process Generally



# The EIS: Alternatives

## No Action Alternative

- Analyzes the impacts that will occur even if there is no agency action

## Preferred Alternative

- The proposed action listed in the Notice of Intent
- The agency's anticipated project

## All other reasonable alternatives

- Decided by the lead agency
- Must be rigorously explored and objectively evaluated
- The number depends on the project

The agency must also describe alternatives eliminated from detailed study with a brief discussion of the reasons for eliminating them



## EIS Alternatives, Cont.

**Important Point:** The Alternatives and their components are the agency's only options. This is local government's opportunity to offer a desired outcome. While the agency might mix and match Alternatives, anything that is not included **CANNOT** be used in the agency's final decision.



# List of Common Environmental Effects for Agency Actions on Public Lands in Nevada

- Socioeconomic Impacts
- Air Quality
- Water Quality
- Vegetative Resources
- Resident Wildlife
- Migratory wildlife
- Fishery Resources
- Historic Resources
- Sociocultural Resources
- Land Use
- Recreation
- Socioeconomics

**Important Point:** It is critical that the County provide detailed studies for these effects. It is especially important for counties focus on socioeconomic impacts.



# Mitigation Measures

- Discussion of how the proposed environmental effects can be mitigated.
  - For example, design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts can be mitigated
- Mitigation measures do not have to be completely specified or identified at the time an action is taken

**Important Tip:** This is a good place to offer recommendations to the agency



# Supplemental Environmental Impact Statement

**Significant new circumstances or information** relevant to environmental concerns or **substantial changes in the proposed action** that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the DEIS, FEIS, or ROD. 40 C.F.R. §1502.9(c).



# How to Enforce NEPA

Only a court can tell the agency it violated NEPA

To sue, you must participate in the NEPA process



# Common Legal Challenges

- The agency did not follow the correct procedure
- The agency did not prepare an EIS when it should have
- The contents of the EIS was inadequate
  - A court must take a “hard look” at the environmental consequences.
- The final decision was “arbitrary and capricious,” or not rationally related to the information provided in the Administrative Record



# NEPA Takeaways

- Planning decisions can be made that address both local concerns as well as federal land managers priorities and goals
- Local government and stakeholder engagement is crucial
- Counties have a better opportunity to affect the outcome when they are fully engaged
- Counties often lack the capacity or studies to fully engage in the NEPA Process
  - Socioeconomic impact baseline data
  - Partnerships with the scientific community
  - Robust land use planning efforts



# NEPA Reading Materials

- NEPA (The statute creating NEPA)
  - 42 U.S.C. §4331 *et seq.* at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap55-sec4321.htm>
- NEPA Regulations (How agencies must implement NEPA)
  - 40 C.F.R. Parts 1500-1508 at [https://ceq.doe.gov/ceq\\_regulations/Council\\_on\\_Environmental\\_Quality\\_Regulations.pdf](https://ceq.doe.gov/ceq_regulations/Council_on_Environmental_Quality_Regulations.pdf)
- The Council on Environmental Quality (CEQ), A Citizen's Guide to NEPA
  - [https://ceq.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf)
- Each Agency has its own NEPA Handbook
  - BLM Handbook  
[http://www.blm.gov/style/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf](http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf)
  - USFS **NEPA guidance handbook (FSH 1909.15)**  
<http://www.rosemonteis.us/files/references/045859.pdf>
  - FWS [https://www.fws.gov/r9esnepa/nepa\\_handbook2.pdf](https://www.fws.gov/r9esnepa/nepa_handbook2.pdf)

# The Endangered Species Act (ESA)

Species are extinct or in danger or extinction due to untempered economic growth and development and these species are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. 16 U.S.C §§ 1531 *et seq.*



# The Purpose of the ESA

To **conserve** species using “**all methods and procedures** which are **necessary to bring** any **endangered** species or **threatened** species to the point at which the **measures provided pursuant to this chapter are no longer necessary.**” 16 U.S. Code § 1532

**Important Point:** Some argue that the ESA should only apply to man-caused species decline, but the provisions of the ESA apply no matter what the cause.



# “Endangered” and “Threatened” Species Definitions

**Endangered Species:** “Any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6)

**Threatened Species:** “Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20)



## “Best Available Science”

The agencies must inform their decisions using “the best scientific data available.” 15 U.S.C. §1533(b)(2)

An agency has met this standard so long as it has used information readily available at the time it made its decision and explains its use of that information.



# Key Measures of the ESA

- The ESA's conservation measures apply to listed species and their critical habitats, designated by FWS and NMFS
- State conservation measures may mean a listing is not needed
- Once listed, Section 7 of the ESA directs a federal agency to consult with FWS to determine whether a federal action must be altered to prevent jeopardy to a listed species or adversely modify its critical habitat. 16 USC 1536(a)(2)



# Listing Factors: What Findings Prove a Species is Endangered or Threatened?

- The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms;
- Other natural or manmade factors affecting its survival.



# Consultation Example

- In Nevada, if the Greater Sage-Grouse was listed as an endangered species the Bureau of Land Management and United States Forest Service would have to consult with the Fish and Wildlife Service each time they initiate an action within Greater Sage-Grouse critical habitat (which is not established until a species is listed)
- This would impact many BLM and USFS actions, especially those subject to NEPA.
- The FWS would likely impose strict design or other restrictions or mitigation requirements on permit operations or development



# Common Legal Challenges

Should the species should be listed?

Did the agency use the best available science?

Did the agency follow the proper procedures?

Was the decision based on the information provided in the Administrative Record?

**Important Point:** Listing challenges are perhaps the most controversial for counties



# County Efforts Matter to the ESA

Section 4(b)(1)(A) requires agencies to take **“into account those efforts, if any, being made by any State or foreign nation, or political subdivision..., to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction or the high seas.”**



# The PECE Report: The FWS Can Rely on Local Conservation Efforts To Avoid a Listing

Agencies developed Policy for the Evaluation of Conservation Efforts (PECE) guidelines.

The Report says Agencies may determine that a species listing is not warranted if the county has a conservation effort that is **sufficiently certain to be effective and implemented**.



# Takeaways

- Local area working groups or projects, if developed using PECE criterion (sufficiently certain to be effective and implemented), are an effective way to take local control over species conservation efforts
- County wildlife plans should be considered in listing decisions



# ESA Reading Materials

- The ESA
  - 16 U.S.C §§ 1531 *et seq.* at <https://www.law.cornell.edu/uscode/text/16/chapter-35>
- PECE Report
  - Summary and Explanation, [https://www.fws.gov/greatersagegrouse/documents/ESA%20Process/20141002\\_GRSG\\_PEC\\_E.pdf](https://www.fws.gov/greatersagegrouse/documents/ESA%20Process/20141002_GRSG_PEC_E.pdf)
  - The Report, <https://www.gpo.gov/fdsys/pkg/FR-2003-03-28/pdf/03-7364.pdf>
- Interesting Articles
  - Barriers to Endangered Species Act Delisting, [https://oversight.house.gov/wp-content/uploads/2016/04/Baier-Testimony\\_April-20-2016\\_Revised.pdf](https://oversight.house.gov/wp-content/uploads/2016/04/Baier-Testimony_April-20-2016_Revised.pdf)
  - About the PECE Report and recent listing decisions, <http://www.eenews.net/stories/1060024255>





***NACO's Goal is to Ensure Counties' Voices Are Heard***

## Questions?

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